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NOTE AND COMMENT

THE LIABILITY OF A TOWNSHIP FOR INJURY TO AN AUTOMOBILE DUE TO DEFECTS IN A HIGHWAY.—The very general introduction of the automobile as a vehicle for travel upon city streets and country highways has given rise to a variety of questions for settlement in the courts, some of which, on account of the character of the vehicle, its motive power and the speed at which it is ordinarily driven, are novel and as yet largely outside of the range of precedent. Such a question was recently determined by the Supreme Court of Massachusetts in the case of *Doherty* v. *Town of Ayer,* decided Feb. 24, 1908, and reported in 83 N. E. Rep., p. 677.

The plaintiff brought his action for damage to his automobile, alleged to have been caused by a defect in a highway which the defendant township was bound, under the law, to keep in repair. The road at the place of the accident was being changed and cut down by a street railway company, in order to prepare a place for its track, and, as a consequence, for a distance of three or four hundred feet, and throughout the entire width of the road, the surface, instead of being hard and well fitted for travel, was sandy and could only be used with difficulty. However, it could be used by, and was

constantly used for, ordinary vehicles without particular trouble and without danger. It was entirely safe also for heavily loaded teams, although they sometimes needed assistance in order to get through the sand. This the workmen upon the road, under orders from the railway company, stood ready to furnish. The road was always left in a level condition and without holes. The plaintiff was familiar with the road and knew of the changes in the grade that the railway company was making. Indeed, early in the afternoon of the day of the accident he passed over the road in his automobile without trouble. But returning in the evening, he had only partially cleared the sandy place in the road when the automobile became stalled. In the process of extricating it, which was accomplished only by the aid of a horse and laborers, the machine was broken and badly damaged. In answer to a special question, the jury found that the road at the place in question was reasonably safe for carriages other than automobiles. As to whether or not the place of the accident was within the traveled part of the old highway, or entirely outside of it, the evidence was conflicting. The trial judge instructed the jury that an automobile was a carriage within the meaning of a statute of the state providing that "highways, town ways, causeways and bridges shall, unless otherwise provided, be kept in repair at the expense of the city or town in which they are situated, so that they may be reasonably safe and convenient for travelers, with their horses, teams, and carriages at all seasons," and that it was the duty of the defendant township, under that statute, "to keep its roads reasonably safe and convenient for automobiles, so that they might be protected." To this ruling the defendant excepted.

The question raised by the exception is one of large importance to cities and townships that are by statute made responsible for the safe condition of highways. What is the extent of the responsibility imposed? Does it include the keeping of the highways in a usable and safe condition for all vehicles for travel that the wit of man may devise, or only for those of which mention is made in the statute and others that are similar? It is well known that the use of automobiles upon our city streets and country roads is the source of great inconvenience and at times of danger to those using such streets and roads, as it was contemplated they should be used when turned over to the public. It is also well known that the expense of keeping highways in a usable condition for ordinary vehicles is largely increased by the general use thereon of automobiles. Must the public meet this extra expense and also be responsible for any and all damages that may be suffered by those using automobiles on account of highways being in an unsafe condition for such vehicles, although usable and reasonably safe and convenient for travelers using the ordinary modes of conveyance?

The reviewing court sustained the exception, holding that, though persons may lawfully travel in automobiles upon highways, they cannot hold a township liable for a failure to make special provisions required only for their safety and convenience while using such vehicles, if the roads are kept reasonably safe and convenient for travel generally. "When towns," said the court, "were first required by law to keep their highways and town ways 'reasonably

safe and convenient for travelers, with their horses, teams and carriages at all seasons of the year,' there was no thought of putting upon them such a burden as would be imposed if they were compelled to keep all of these ways in such a condition that automobiles could pass over them safely and conveniently at all seasons. Horses, teams and carriages are grouped together in the statute, and the carriages referred to are those drawn by animal power." The court goes on to suggest that many highways run into remote and sparsely settled portions of the state and over vast stretches of sandy surface, and that to keep such ways in a condition that would make them reasonably safe and convenient for travel in automobiles at all seasons of the year would be the imposition upon the public of an unreasonable burden, a burden, indeed, that in some sections would be heavier than could be borne.

But little direct authority upon the precise question involved in the case under review is as yet to be found in the books. In *Richardson* v. *Inhabitants of Danvers,* 176 Mass. 413, 57 N. E. Rep. 688, 50 L. R. A. 127, 79 Am. St. Rep. 320, to which reference is made in the opinion, the question was as to whether or not a township was liable for injuries received by a person while riding a bicycle, the accident resulting in such injuries being due to a defect in the highway which made it dangerous to the bicycle rider but not to the traveler by the ordinary modes of conveyance. The court held that while for many purposes the bicycle may be regarded as a vehicle or carriage, and while it may be lawfully used upon a highway, yet it cannot be considered as a carriage within the meaning of the term as used in the statute. "The statute in question" (the one hereinbefore quoted), said the court, "was passed long before bicycles were invented, but, although of course it is not to be confined to the same kind of vehicles then in use, we are of opinion that it should be confined to vehicles *ejusdem generis,* and that it does not extend to bicycles." The court suggested that it would "impose an intolerable burden upon towns to hold them bound to keep their roads in such a state of repair and smoothness that a bicycle could go over them with assured safety." A case referred to in the opinion as one in which the question under discussion was raised but not decided is *Baker* v. *Fall River,* 187 Mass. 53, 72 N. E. Rep. 336. In this case the action was for damages for personal injuries to one riding in an automobile, the accident causing the injuries being due to an alleged defect in a city street. The jury returned a verdict for the plaintiff. The reviewing court said: "In the present case the alleged defect was one which would be dangerous to ordinary vehicles. Therefore, we now have no occasion to consider whether roads must be kept in such a state of repair and smoothness that an automobile can go over them with assured safety." The court held that as the defect was one that would be dangerous to ordinary travel, the plaintiff would not be precluded from recovery because of the nature of the vehicle in which he was riding. In the case of *Hendry* v. *Town of North Hampton,* 72 N. H. 351, 56 Atl. 922, 64 L. R. A. 70, the plaintiff, while riding a bicycle and exercising due care, "ran into a mud puddle, and was thrown over a dangerous embankment which was not railed or guarded, and received injuries for which she brought" an action against the township. The court, while recognizing apparently the doctrine that the township under

the statute of the state would not be required to keep its highways in a condition suitable for travel by means of the bicycle, held that the plaintiff was entitled to recover because the dangerous embankment was not guarded in such a way as to afford adequate protection to travelers by the methods of conveyance mentioned in the statute. "The plaintiff," said the court, "being a traveler upon the highway, * * * notwithstanding she was riding on a bicycle, was entitled at least to a highway in condition suitable for ordinary travel and to damages for injuries happening to her by reason of any unsuitableness of the highway for such travel." It has been held by the Supreme Court of Michigan that "reasonable care in the construction and maintenance of highways for ordinary vehicles, such as wagons and carriages, is the measure of duty resting upon municipalities" under the statute, and that in the absence of further legislation, the courts will not extend the duty so as to make it necessary for the public authorities to provide suitable highways for bicycles and vehicles of like character. *Leslie* v. *Grand Rapids,* 120 Mich. 28, 78 N. W. Rep. 885. See, also, *Sutphen* v. *North Hamstead,* 80 Hun 409, 30 N. Y. Supp. 128; *Rust* v. *Essex,* 182 Mass. 313, 65 N. E. Rep. 397; *Wheeler* v. *City of Boone,* 108 Iowa 235, 78 N. W. Rep. 909. It has been held by the Supreme Court of Washington that a city which exercises its option to construct a bicycle path along the side of one of its streets, is bound to maintain it in a condition reasonably safe for the purpose for which it is intended. *Prather* v. *City of Spokane,* 29 Wash. 549, 70 Pac. Rep. 55, 59 L. R. A. 346.

While the law of the present time in regard to damages suffered through accidents to automobiles and other like vehicles, by reason of imperfections in highways and streets, is undoubtedly that a recovery can only be had when the imperfection is of such a nature as to make the highway or street unsafe for travel by the ordinary modes of conveyance, yet it is not improbable that the growing use of the self-impelled machine may in the future lead to an extension of the rule governing liability. But a change in this regard will probably come through legislation and not by any material modification by the courts of the present doctrine. H. B. H.

THE STATUTE OF LIMITATIONS AND AMENDED COMPLAINTS.—Plaintiff brought action for damages for the death of his intestate in the mine of the defendant. In his original complaint, he sought to recover because of the failure of the defendant to provide a reasonably safe place in which his intestate might work. Subsequently he amended his complaint by adding a count under which he sought to recover because of the negligence of one Dunn, a servant of the defendant, whose orders the intestate was bound to obey, in ordering the intestate into a mine when it was filled with suffocating gas. The original complaint was based on common law liability of the defendant. The amendment was based on a statutory liability. (Code of 1896, § 1749, subdiv. 3). The Statute of Limitations was interposed as a defense to the amendment. If the amendment were considered as filed at the time of the original complaint, the Statute of Limitations had not run. If considered as filed at the time it actually was filed, the